Fleming Companies, Inc. (formerly Malone & Hyde, Inc.) and General Drivers, Salesmen & Warehousemen's Local Union No. 984. Case 26–CA–17054

October 31, 2000 DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX, LIEBMAN, AND HURTGEN

On June 9, 1997, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed a joint answering brief and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and to adopt the recommended Order as modified.

In January 1994, the Respondent purchased and became the successor to a grocery warehouse operation, Malone & Hyde, Inc. Malone & Hyde was a party to a succession of collective-bargaining agreements with the Union. The last of these agreements expired January 8, 1992, at which time the Union ceased to represent the unit employees.

Several years earlier, on January 28, 1988, Malone & Hyde suspended employee Richard Mack, and on February 26, it discharged him. The suspension and discharge notices state that Mack was in violation of company policy and article X of the parties' agreement.

Mack filed grievances in response to the suspension and discharge under the contractual grievance and arbitration clause. In the first grievance, dated January 29, Mack asserted that he had been falsely accused of "insubordination and not carrying out company instructions," that he had not been given a reason for his suspension, that the supervisor said that he was to send Mack home but did not know why, and that Mack had never been warned about using the telephone on company time and had permission to use it. In the second grievance, dated February 26, Mack protested "the charge" brought against him, stated that he had been given a receipt for a bill and that he had been given too

much money back, and that when he realized this he informed the dispatcher, who responded that there was "no problem." The grievances requested that Malone & Hyde "reverse the dishonesty charge" and compensate him for lost time. The third grievance, dated March 1, protested Mack's discharge on the basis of a lack of evidence and the alleged untruthfulness of two dispatchers.

As set out above, the Union ceased representation of the bargaining unit in January 1992. However, it remained obligated to process Mack's grievances because they were filed while the collective-bargaining agreement was in effect. In June 1992, a Federal district court found that the collective-bargaining agreement in effect at the time of the discipline also obligated Malone & Hyde to take Mack's grievances to arbitration and, in 1994, the Sixth Circuit Court of Appeals affirmed that decision in *General Drivers v. Malone & Hyde, Inc.*, 23 F.3d 1039 (6th Cir. 1994), cert. denied 513 U.S. 1057 (1994).

By letters dated at various times between August 4, 1995, and January 21, 1996, the Union requested the Respondent, which as indicated above had by then succeeded Malone & Hyde, to furnish it with certain information. This included copies of: Mack's personnel file; any statements taken from witnesses; work rules applicable at the time of discharge; rules on attire during the period around the discharge; disciplinary actions involving attire for the period 1985–1988; disciplinary actions for alleged DOT violations for the period of 1985–1988; and a list of names, addresses, telephone numbers, and social security numbers of all collective-bargaining unit employees employed at Malone & Hyde in 1988. The Respondent refused to provide the requested information. The judge found that the Respondent had violated Section 8(a)(5) and (1) by failing and refusing to provide the Union with information necessary to pursue Mack's grievance with respect to all of the information sought other than the social security numbers of employees in the unit in 1988.³ The Respondent has excepted to the judge's findings that it was obligated to provide the information requested.

We affirm the judge's findings that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to provide a complete copy of Mack's personnel file, copies of any work rules applicable at the time of Mack's discharge, and a list of names, addresses, and telephone numbers of all bargaining unit members employed by the Respondent's predecessor in 1988. This information is "intrinsic to the core of the employer-employee relation-

Unless otherwise noted, all subsequent dates are in 1988.

² The discharge notice refers specifically to sec. 17 of art. X of the collective-bargaining agreement, which provides that the Respondent shall not discharge or suspend any employee without "just cause"; lists major offenses for which discharge without notice is permitted; and lists lessor offenses for which the employee shall be given written warning.

³ No exceptions were filed to the dismissal of the allegation regarding the social security numbers.

ship^{3,4} and its relevance to Mack's grievance is apparent. However, for the reasons discussed below, we find merit in the Respondent's exceptions with respect to statements taken from witnesses.

A. Witness Statements

The Respondent argues that Board precedent does not require it to provide statements taken from witnesses. We agree. Section 8(a)(5) of the Act imposes on an employer the "general obligation" to furnish a union, on request, information relevant and necessary to the proper performance of its duties as bargaining representative. In *Anheuser-Busch, Inc.*, 5 the Board, while recognizing this general obligation, set out an exception to this duty for statements obtained during an investigation of employee misconduct. The Board held that "the 'general obligation' to honor requests for information, as set forth in [*NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967)] and related cases, does not encompass the duty to furnish witness statements themselves." Based on this clear Board precedent, we reverse the judge.

B. Other Information Requested

The Respondent also argues that it is not obligated to provide the Union with rules on attire in effect around the time of Mack's discharge and information concerning disciplinary actions involving attire or alleged DOT violations for 1985–1988 because they are not relevant to Mack's grievances.

We disagree. It is well established that an employer has an obligation to provide a union, on request, with information relevant to the union's duty as a representative of the employees, including information required to process a grievance. *NLRB v. Acme Industrial Co.*, supra, 385 U.S. at 438-439. Information pertaining to the

bargaining unit is presumptively relevant and no specific showing of relevance is required. Ohio Power Co., 216 NLRB 987, 991 (1975), enfd. 531 F.2d 1381 (6th Cir. 1986). In seeking such information, a union "is not required to prove the precise relevance of such information unless the Respondent submits evidence sufficient to rebut the presumption of relevance." Mathews Readymix, 324 NLRB 1005, 1007 (1997), enfd. in relevant part 165 F.3d 74 (D.C. Cir. 1999). In this case, the Respondent has submitted no evidence to rebut the presumption that the information sought by the Union, which pertains to the bargaining unit, is relevant. Rather, the Respondent does nothing more than assert that the information is not relevant to Mack's grievances. We find, however, that the Respondent may not rely on Mack's declarations in his grievances to rebut the presumption because the facts indicate that Mack may well have lacked knowledge of all the reasons for the suspension and discharge and the Respondent asserts no reasons for its actions. Thus, we adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to provide this information.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified below, and orders that the Respondent, Fleming Companies, Inc. (formerly Malone & Hyde, Inc.), Southaven, Mississippi, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

- 1. Substitute the following for paragraphs 2(a), (b), and (c), respectively.
- "(a) Within 7 days of this Order, furnish the Union with the following information requested by the Union on August 4, 1995, among other dates: a copy of employee Mack's personnel file; copies of work rules applicable at the time of his discharge; rules on attire during the period around the discharge; disciplinary actions involving attire for the period 1985–1988; disciplinary actions for alleged DOT violations for the period 1985–1988; and a list of the names, addresses, and telephone numbers of all unit employees employed in 1988.
- "(b) Within 14 days after service by the Region, post at its Southaven, Mississippi facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not al-

⁴ Children's Hospital of San Francisco, 312 NLRB 920, 930 (1993), enfd. sub nom. California Pacific Medical Center v. NLRB, 87 F.3d 304 (9th Cir. 1996) (bargaining unit employee names are intrinsically relevant). See also Georgetown Holiday Inn, 235 NLRB 485, 486 (1978) (names and addresses are presumptively relevant and require no particularized showing of need).

⁵ 237 NLRB 982 (1978).

⁶ Id. at 984–985. See also *NLRB v. New Jersey Bell Telephone*, 936 F.2d 144, 150 (3d Cir. 1991); *Boyertown Packaging Corp.*, 303 NLRB 441, 444 (1991).

⁷ Chairman Truesdale and Member Hurtgen disagree with their colleagues' conclusion that the Board should overrule *Anheuser-Busch*. In addition to relying on the rationale of that case, they note that no party here has sought to overrule that case. Thus the matter has not been litigated or briefed. In these circumstances, other than relying on *Anheuser-Busch*, they consider it unnecessary to respond to the contention made by their colleagues. As explained in their separate opinion, Members Fox and Liebman believe that *Anheuser-Busch* was wrongly decided, but in the absence of a majority to overrule it, they concur in the reversal of the judge's decision with regard to the witness statements.

tered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 4, 1995.

- "(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply."
- 2. Substitute the attached notice for that of the administrative law judge.

MEMBERS FOX AND LIEBMAN, concurring.

We agree with our colleagues that the Respondent violated Section 8(a)(5) and (1) by failing to provide the Union with a complete copy of employee Richard Mack's personnel file, copies of work rules applicable at the time of Mack's discharge, and the names, addresses and telephone numbers of bargaining unit members employed in 1988 by the Respondent's predecessor. We also agree with them that the Respondent violated the Act by failing to provide the Union with copies of rules on attire in effect around the time of Mack's discharge and copies of any disciplinary actions for alleged attire and DOT violations for the period of 1985 to 1988. Finally, we agree with our colleagues that under the Board's decision in Anheuser-Busch, 237 NLRB 982 (1978), the Respondent had no duty to comply with the Union's request for copies of statements taken from witnesses. Unlike our colleagues, however, we regard Anheuser-Busch as an unnecessarily broad exception to the general statutory duty to provide requested information that relates to the duty to bargain collectively. To the extent that a request for witness or informant statements presents confidentiality concerns, we believe that those concerns can and should be resolved not by a blanket rule exempting such statements from disclosure but rather by utilizing the balancing-of-interests test set forth by the Supreme Court in Detroit Edison Co. v. NLRB, 440 U.S. 301 (1976), for analyzing information requests raising confidentiality issues. In the absence of a majority to overrule Anheuser-Busch, we concur in the result reached by the majority here, but we write separately to express our concerns about the adverse impact of that decision on the grievance-arbitration process.

The Board's holding in *Anheuser-Busch* had its foundation in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978). In that case, the Supreme Court considered

whether the Freedom of Information Act (FOIA)1 required the agency to disclose, prior to an unfair labor practice hearing, statements of witnesses the General Counsel anticipated would testify at the hearing, or whether such statements were covered under a provision exempting from mandatory disclosure "investigatory records compiled for law enforcement purposes" where production of the records would "interfere with enforcement proceedings."² The Court held that the exemption was applicable, finding that "the dangers posed by premature release of witness statements would involve precisely the kind of 'interference with enforcement proceedings' that [the exemption] was designed to avoid." Id. at 239. The "most obvious risk," the Court stated, was that "employers or, in some cases, unions will coerce or intimidate employees and others who have given statements, in an effort to make them change their testimony or not testify at all." Id. at 239.

In *Anheuser-Busch*, decided 2 months after issuance of the decision in *Robbins Tire*, the Board held that the same concerns applied in the grievance-arbitration context, and that the integrity of that process would be "diminish[ed] rather than foster[ed]" if either party to a collective-bargaining relationship were required to furnish witness statements to the other party. 237 NLRB at 984. Although the Board noted evidence that could have provided a narrow basis for dismissing the unfair labor practice complaint,³ it held "without regard to the particular facts of this case . . . that the 'general obligation' to honor requests for information, as set forth in [*NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967)] and related cases, does not encompass the duty to furnish witness statements themselves." Id. at 984–985.

We do not perceive the need for such a broad holding. *Robbins Tire* affirmed the Board's invocation of a narrow statutory exemption from the mandatory disclosure requirements of FOIA that is specifically designed to protect public law enforcement proceedings from interference. In finding the exemption to be applicable to witness statements obtained in connection with the investigation of unfair labor practice charges, the Court relied not only on the potential for coercion or intimidation of witnesses, but also on the absence of any evidence of an intent on the part of Congress to overturn

¹ 5 U.S.C. § 552.

² 5 U.S.C. § 552(b)(7)(A).

³ Although the respondent employer had refused to give the union copies of the actual witness statements, it did furnish copies of disciplinary reports which summarized the substance of the witness statements. Later, the employer's attorney gave the union a list of names of the employees who had given statements and read portions of their statements aloud to the union's attorney. 237 NLRB at 984. Thus, the Board noted, the employer in no way impeded the Union's investigation of the suspended employee's grievance. 237 NLRB at 984.

intent on the part of Congress to overturn the NLRB's longstanding rule against prehearing disclosure of witness statements. Noting that FOIA "was not intended to function as a private discovery tool," the Court also stated that it could not see how FOIA's purpose of "ensur[ing] an informed citizenry . . . needed to check against corruption and to hold the governors accountable to the governed" would be defeated by deferring disclosure of witness statement until the Government had presented its case. 437 U.S. 242–243.

Contrary to the majority, we do not believe the considerations underlying the Court's decision in Robbins Tire are sufficiently present in the grievance arbitration context to justify the Board's adoption in Anheuser-Busch of a blanket rule exempting witness statements from disclosure in that context. Obviously, the FOIA provision exempting certain information from premature disclosure in public law enforcement proceedings does not apply to private procedures that draw their essence from parties' collective-bargaining agreements. Furthermore, although the degree to which prearbitration discovery is permitted in labor arbitration cases may vary greatly, 4 there is no general policy against the prearbitral exchange of information. Indeed, the Supreme Court explained in Acme *Industrial* that the Board's order requiring the production of information which the union had sought in order to determine whether or not the employer had breached the collective-bargaining agreement was

in aid of the arbitral process. Arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims. For if all claims originally initiated as grievances had to be processed through to arbitration, the system would be woefully overburdened. Yet, that is precisely what the respondent's restrictive view would require. It would force the union to take a grievance all the way through to arbitration without providing the opportunity to evaluate the merits of the claim. . . . Nothing in federal law requires such a result.

Id. at 438-439.

While concerns about protecting witnesses from intimidation could legitimately arise in connection with a particular grievance-arbitration proceeding, we are unwilling to presume that this concern routinely exists to the same degree in grievance and arbitration proceedings as in adversarial unfair labor practice litigation and warrants an absolute rule against requiring the production of witness statements. The fact that grievances are being

resolved through collectively bargained procedures is itself an indication that the parties have achieved a more mature and less contentious relationship than typically exists between charging parties and respondents in unfair labor practice cases.⁵ Thus, a factor weighing against the likelihood of employer or union coercion of witnesses in a grievance-arbitration proceeding is the parties' consideration of the potential long-term adverse impact of such conduct on their continuing collective-bargaining relationship. Cf. *Fawcett Printing Corp.*, 201 NLRB 964, 974 (1973) (parties' longstanding bargaining relationship increases likelihood that union would honor company's request that it keep information confidential).

In contrast to the Anheuser-Busch analysis, the Board makes no categorical presumption in situations where employers have based refusals of union requests for other kinds of relevant bargaining information on concerns about retaliatory threats and coercion. For instance, the Board requires disclosure to requesting unions of the names and addresses of bargaining unit strike replacements unless the employer presents specific proof of danger to the replacements from disclosure of this information. See, e.g., United Aircraft Corp., 181 NLRB 892, 903 (1970), enfd. 434 F.2d 1198 (2d Cir. 1970). This specific evidentiary requirement is consistent with the diminished potential, noted above, for coercive conduct by unions or employers in an established and mature bargaining relationship, even one that is temporarily engulfed in economic strife.

In another significant case, *Transport of New Jersey*, 233 NLRB 694 (1977), the Board held that an employer has a duty to turn over to the union the names of witnesses to an incident for which an employee grievant was disciplined. Although the respondent employer there claimed that disclosure of the names of witnesses would expose them to harassment, the Board stated that "the dangers suggested by Respondent are at most speculative and the likelihood of their occurrence is substantially outweighed by the Union's need to obtain information relevant and necessary to the proper performance of its statutory function of processing grievances." Id. at 695.

Anheuser-Busch specifically affirmed the holding of *Transport of New Jersey* with respect to the duty to provide witness *names*, if requested by a union when processing a grievance, even while holding that a party could

⁴ See generally *Goldman*, "Discovery and the Duty to Disclose," Labor and Employment Arbitration, chap. 2 (1993).

⁵ Indeed, the evolution of private party contractual dispute resolution systems, and of Federal accommodation and support of those systems, is reflective of a general maturation of labor relations in this country. "As labor organizations grew in strength and developed toward maturity, congressional emphasis shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes." *Boys Market, Inc. v. Retail Clerks Union*, 398 U.S. 235, 251 (1970).

withhold witness *statements* from disclosure without specific proof of a danger of harassment to those witnesses. 237 NLRB at 984 fn. 5. It is not readily apparent, as an administrative law judge in a subsequent case remarked, why the "speculative nature of the dangers of harassment is greater" in the one case than in the other; nor is it apparent why requiring specific evidence of the likelihood of witness intimidation or harassment with respect to witness statements would not serve the same prophylactic purpose while preserving the general right of requesting unions to relevant information during the processing of unit employees' grievances.

The requirement in *United Aircraft* and *Transport of New Jersey* of a specific evidentiary showing in support of an asserted confidentiality defense presaged the Supreme Court's balancing-of-interests test in *Detroit Edison*. The Board in *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 30 (1982), enfd. sub nom. *Oil Workers v. NLRB*, 711 F.2d 348 (D.C. Cir. 1983), found that *Detroit Edison* requires it

to balance a union's need for information against any "legitimate and substantial" confidentiality interests established by the employer, accommodating the parties' respective interests insofar as feasible in determining the employer's duty to supply the information. The accommodation appropriate in each individual case would necessarily depend upon its particular circumstances.

As subsequently refined, the test requires that (1) the party asserting a "legitimate and substantial" confidentiality interest has the burden of demonstrating the interest, and (2) if the burden is met, an accommodation must be sought to resolve the competing need for the information and the justified confidentiality concerns. *Pennsylvania Power & Light Co.*, supra at 1105–1106.

The Board has applied the *Detroit Edison* test to find that asserted confidentiality interests justified conditional refusals to provide requested bargaining information in certain circumstances. See *Postal Service*, 306 NLRB 474 (1992) (names of witnesses to drug transactions); *Pennsylvania Power*, supra, 301 NLRB 1104 (names and addresses of informants providing probable cause basis for employee drug testing); and *Minnesota Mining & Mfg. Co.*, supra, 261 NLRB at 27 (trade secrets). The application of the *Detroit Edison* test in *Pennsylvania Power* is of particular note. The Board there considered confidentiality claims based on concerns about witness

intimidation and harassment. It found that the specific factual considerations supporting the employer's interests in protecting informants against the "potential for harassment" outweighed the union's need for the informants' names to process drug testing grievances. The Board emphasized the substantial public safety interest in assuring that nuclear and fossil power production plants are drug-free workplaces and the obvious potential for harassment of informants reporting on criminal activity. To accommodate the union's need for information, however, the Board concluded that a summary of the informants' statements, though not the statements themselves, had to be supplied.

A comparison of Pennsylvania Power to the present case demonstrates the superiority of a flexible Detroit Edison balancing-of-interests test over a fixed Anheuser-Busch-type standard. The circumstances present in Pennsylvania Power are significantly different from those in the present case and the differences tip the Detroit Edison balance in favor of requiring disclosure of the requested information here. First, no employee misconduct is asserted which would pose the kind of operational safety concerns posed by drug use in a nuclear power plant. Second, because there is no allegation of misconduct of a criminal nature, the concern expressed by the Board in *Pennsylvania Power* about the potential for harassment of informants reporting on criminal activity is not present. Third, because the Union had ceased representing Respondent's employees more than 3 years prior to the time it made its request for the witness statements, and Mack himself had been out of the work force for more than 7 years, the risk that either *could* engage in intimidation or retaliation, were they so inclined, was and continues to be virtually nonexistent.

Nor does the Respondent advance a substantial interest in maintaining the confidentiality of the statements. For example, the Respondent does not assert, nor does the evidence reflect, that it had a prior published confidentiality policy or that its officials promised confidentiality to the witnesses. We note also that an employer raising confidentiality concerns may not simply refuse to furnish the information, but has an obligation to come forward with some offer to accommodate both its concerns and the Union's legitimate needs for relevant information. *Metropolitan Edison Co.*, 330 NLRB 107 (1999); *Tritac Corp.*, 286 NLRB 522 (1987). Here, the employer simply denied the request for information without even raising a confidentiality concern, let alone proposing an alternative that would accommodate the concern.

Based on the foregoing, then, we find little reason for adhering to *Anheuser-Busch*'s absolute exception of witness statements from the general statutory duty to

⁶ New Jersey Bell Telephone Co., 300 NLRB 42, 55 fn. 13 (1990), enfd. 936 F.2d 144 (3d Cir. 1991). Accord: Pennsylvania Power & Light Co., 301 NLRB 1104, 1112 (1991).

provide requested information relevant to the processing of contractual grievances. The *Detroit Edison* balancing-of-interests test effectively protects witnesses in those circumstances where there is proof, not speculation, of a substantial and legitimate concern about harassment or intimidation, while it preserves the mechanism for accommodating a union's interest in obtaining sufficient information relevant to a grievance.

Were we able to command a majority for our position, we would overrule *Anheuser-Busch* and find that, under the *Detroit Edison* test, the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to provide the requested names of witnesses. However, in the absence of a majority for that position, we agree that *Anheuser-Busch* requires dismissal of the allegation that the Respondent violated the Act by failing to provide the Union with copies of witness statements.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to furnish General Drivers, Salesmen & Warehousemen's Local Union No. 984 with information necessary for it to process a grievance through arbitration as collective-bargaining representative on behalf of employees in the following appropriate unit:

Included: All full time and regular part time truck drivers, garage employees, warehouse employees, inventory control employees, warehouse meat receiving clerks, shipping and receiving employees, warehouse maintenance employees, pallet builders and sanitation employees, employed at our warehouse facilities in Southaven, Mississippi and Memphis, Tennessee.

Excluded: General office clerical employees, truck schedulers, guards, checkers supervisors, and other supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 7 days of the Board's Order, furnish the Union with the following information requested by the Union on August 4, 1995, among other dates: a copy of employee Mack's personnel file; copies of work rules applicable at the time of his discharge; rules on attire during the period around the discharge; disciplinary actions involving attire for the period 1985–1988; disciplinary actions for alleged DOT violations for the period 1985–1988; and a list of the names, addresses, and telephone numbers of all unit employees employed in 1988.

FLEMING COMPANIES, INC.

Jack L. Berger, Esq., for the General Counsel.

David P. Jaqua, Esq. (The Kullman Firm), of Memphis, Tennessee, for the Respondent.

Samuel Morris, Esq. (Agee, Allen, Godwin, Morris Lawrengi & Hamilton, PC), of Memphis, Tennessee, for the Charging Party.

BENCH DECISION STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on May 5, 1997, pursuant to a complaint filed by the Regional Director for Region 26 of the National Labor Relations Board (the Board) on March 14, 1996, and is based on a charge filed by the General Drivers, Salesmen & Warehousemen's Local Union No. 984 (the Charging Party or the Union). The complaint alleges that Fleming Companies, Inc. (formerly Malone & Hyde, Inc.) and (the Respondent or the Company) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by failing and refusing to furnish information to the Charging Party which is necessary for the Charging Party to arbitrate a grievance on behalf of a unit employee. The complaint is joined by the answer of Respondent filed on March 28, 1996, wherein Respondent raised several affirmative defenses and denied the commission of any violations of the Act.

I issued a bench decision at the hearing on May 5, 1997, pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations upon the entire record in this proceeding including my observations of the witnesses who testified here, and after due consideration of the trial memoranda filed by the parties. In accordance with Section 102.45 of the Board's Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A" the pertinent portion (pp. 38–52) of the trial transcript as corrected and modified by me.

FINDINGS OF FACT

I. JURISDICTION

The Business of Respondent

The Respondent maintains its home office and place of business in Mississippi where it is engaged in the wholesale purchase and distribution of grocery products and it is a successor to Malone & Hyde, Inc. and it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The General Drivers, Salesmen & Warehousemen's Local Union No. 984 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE APPROPRIATE UNIT

The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All full time and regular part time truck drivers, garage employees, warehouse employees, inventory control employees, warehouse meat receiving clerks, shipping and receiving employees, warehouse maintenance employees, pallet builders and sanitation employees, employed at Respondent's warehouse facilities in Southaven, Mississippi and Memphis, Tennessee.

Excluded: General office clerical employees, truck schedulers, guards, checkers supervisors, and other supervisors as defined in the Act.

IV. THE ALLEGED UNFAIR LABOR PRACTICE

CONCLUSIONS OF LAW

- 1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The Respondent violated Section 8(a)(1) and (5) of the Act by its failure and refusal to furnish information to the Union necessary for the Union's arbitration of a grievance with the exception of the employees' social security numbers.
- 4. The above unfair labor practice in connection with the business engaged in by Respondent has the effect of burdening commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent has violated the Act, it shall be ordered to cease and desist therefrom and to take certain affirmative actions, including the posting of an appropriate notice, designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]

APPENDIX A BENCH DECISION

38

JUDGE CULLEN: Thank you. All right, I'm going to issue a bench decision in this case. A complaint was filed in this case by the General Counsel and its alleges that the charge in the proceeding was filed by the Union on September 21, 1995 and a copy was served upon Respondent by Certified Mail on September 22, 1995. The Respondent admits and I so find.

Respondent also admits and I so find that at all material times the Respondent a corporation with an office and place of business in South Haven, Mississippi herein called the Respondent's facility has been engaged in the wholesale grocery business

Further, it is alleged by the Complaint and admitted by Respondent that during a twelve month period ending February 29, 1996 Respondent in conducting its business operations described above in Paragraph 2 sold and shipped from Respondent's facility goods valued in excess of \$50,000.00 directly to points located outside the State of Mississippi and during that same period purchased and received at Respondent's facility goods valued in excess of \$50,000.00 directly from points located outside the State of Mississippi.

It is further admitted that at all material times the Respondent has been an Employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The Complaint alleges and Respondent admits in part and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Respondent stipulates also that the bargaining unit was appropriate up to the expiration of that collective bargaining agreement in January 1992. I find

39

the unit to have been an appropriate unit for the purposes of collective bargaining during all times material in this case within the meaning of Section 9(b) of the Act.

Included: all full time and regular part time truck drivers, garage employees, warehouse employees, inventory control employees, warehouse meat receiving clerks, shipping and receiving employees, warehouse maintenance employees, pallet builders, and sanitation employees employed at Respondent's warehouse facilities in South Haven, Mississippi and Memphis, Tennessee.

Excluded: General office clerical employees, truck schedulers, guards, checkers, supervisors, and other supervisors as defined in the Act.

The Complaint further alleges and the Respondent admits that since 1957 and I so find that since 1957 and until about January 8, 1992 the Union had been the exclusive collective bargaining representative of the unit employed by Malone and Hyde, Inc., and during that period of time the Union had been recognized as such representative by Malone and Hyde, Inc.. This recognition had been embodied in successive collective

bargaining agreements the most recent of which expired January 8, 1992.

The Complaint also alleges Respondent admits and I find that about January 19, 1994, Respondent purchased Malone and Hyde, Inc. including the facilities described in this Complaint and since that date has been engaged in the same business operations at the same location selling the same products to substantially the same customers and had as a majority of its employees individuals who previously were employees of Malone and Hyde, Inc.

The Complaint also alleges that by virtue of the operations described above Respondent has been the employing entity and is a successor of Malone and Hyde, Inc. The Respondent stipulated at the hearing to its successorship with respect to any liability of Malone

40

and Hyde, Inc. with respect to the collective bargaining agreements. That stipulation was received and I find that for all purposes material herein Respondent was a successor of Malone and Hyde, Inc.

It was further stipulated and I find that pursuant to certain Court Orders the Respondent is obligated to arbitrate the grievance concerning the suspension and discharge of its employee Richard Mack on or about January 28, 1988 and February 29, 1988 respectively.

The Complaint also alleges that since about January 8, 1992 the Union has no longer been recognized as the exclusive collective bargaining representative of the unit except that Respondent is still obligated to process grievances which arose prior to Respondent's predecessor's withdrawal of recognition and while the collective bargaining agreement was in effect. It was stipulated at the hearing that pursuant to Court Orders the Respondent is obligated to arbitrate the suspension and the discharge grievances of Richard Mack and I so find.

The Complaint further alleges and it is admitted and I find that about June 22, 1992 the United States Court for the Western District of Tennessee, Western Division, ordered and adjudged that the collective bargaining agreement legally obligates the Union and the Employer to arbitrate together thegrievance and the Respondent was enjoined to proceed with arbitration provided, however, that the Respondent was not compelled to arbitrate with Richard Mack individually or his attorney as opposed to the Union in it representative capacity. It was further ordered and adjudged that the issues raised by the Respondent of abandonment, withdrawal, estoppel, waiver, and time bar were issues properly determinable by the arbitrator upon resumption of the arbitration process and were thereby not ruled on by the Court.

The Complaint further alleges and I find that Malone and Hyde appealed the Court's ruling and on May 11, 1994 the Sixth Circuit Court of Appeals for the United States Circuit

41

Court of Appeals issued its decision affirming the District Court ruling. Malone and Hyde petitioned for a rehearing and it was denied on June 23, 1994. The United States Supreme Court denied Malone and Hyde's Petition for Certiorari on December 12, 1994.

The Complaint further alleges and I find based on the stipulations and the exhibits presented in this hearing that since about August 4, 1995, August 15, 1995, August 21, 1995, and January 21, 1996 the Union by letters of those dates requested the Respondent to furnish the Union with the following information:

- (1) A complete copy of Mack's personnel file.
- (2) Copies of any statements taken from witnesses.
- (3) Copies of any work rules applicable at the time of Mack's discharge.
- (4) Copies of any rules on attire in effect during the period surrounding Mack's discharge.
- (5) Copies of any disciplinary actions involving attire for the period 1985 to 1988.
- (6) Copies of any disciplinary actions for alleged DOT violations for the period of 1985–1988.
- (7) A list of names, addresses, phone numbers and social security numbers of all collective bargaining unit employees employed at Malone and Hyde in 1988.

The Complaint alleges that the information requested by the Union was necessary for and relevant to the Union's performance of its function as the exclusive collective bargaining representative of the Union in a grievance with regard to Richard Mack's suspension and termination that arose under the collective bargaining agreement in effect between Respondent's predecessor Malone and Hyde, Inc. and the Union from August 18, 1985 to January 8, 1989 and I so find based on the evidence and the stipulations and the exhibits

42

received in this Proceeding with the exception of the social security numbers.

It is also alleged and admitted that since on or about August 4, 1995 Respondent has failed and refused to furnish the Union the information requested by it as set out above. It is further admitted and I find that the most recent date to arbitrate Richard Mack's grievance was set for February 2, 1996 and was cancelled.

The Respondent has taken the position that it is not obligated to supply the requested information to the Union prior to the arbitrator's ruling that Richard Mack's grievance is, in fact, arbitrable. I find against the Respondent's position that it is entitled to a two-tiered procedure wherein the Union must proceed to arbitration for the limited purpose of determining arbitrability, and upon a finding that the grievance may be arbitrable, only then can it proceed with the merits of the grievance and only then would it be entitled to any information.

The General Counsel has cited cases in its Brief that addresses this particular issue and I find that the Board has long held that it is unwilling to institute such a two-tiered arbitration process. *American National Can Co.*, 293 NLRB 901 (1989) and *General Dynamics Corp.*, 268 NLRB 1432 fn. 2 (1984).

With respect to the merits of the information request I find the following cases apply: *Howard University*, 290 NLRB 1006 (1988) and at 1007 where the Board said "it is well established that an Employer has an obligation to provide a Union

with information relevant to its duty as a representative of the e[mployees]." In *Washington Gas Light Co.*, 273 NLRB 116 (1984) the Board found this obligation extended to "information required by the Union to process a grievance," citing *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *Design Craft Jewell Industries*, 254 NLRB 791 (1981). The standard for the relevancy of the information sought by the Union is set forth in *W. L. Moulding Co.*, 272

43

NLRB 1239 (1984) in which the Board citing NLRB v. Rockwell Standard Corp., 410 Fed. 2nd 953, 957 (6th Cir. 1969) stated "The Board's only function in such situation is in 'acting upon the probability that the desired information was relevant and that it would be of use to the Union in carrying out its statutory duties and responsibilities."

An Employer must disclose information and unless it plainly appears irrelevant citing *Telecrompter Corp. v. NLR,B* 570, Fed. 2nd 4, 8 (1st Cir. 1977). Furthermore, the Employer must furnish information that is necessary for the Union to properly prepare for arbitration as long as the information is relevant to the grievance scheduled for arbitration. Citing also *Montgomery Ward &* Co., 234 NLRB 588 (1978); *Kroger Co.*, 226 NLRB 512 (1976). This disclosure is necessary to allow the Union to make an intelligent appraisal of the merits of the members' complaint. Citing *P. R. Mallory & Co.*, 171 NLRB 457, (1968), enfd. 411 Fed. 2nd 948 (7th Cir. 1969).

The General Counsel and Charging Party contend that the information sought by the Union in this case was clearly information that it needed to prepare for the presentation of Mack's grievances. The Union requested copies of the grievant's personnel file, its work rules applicable at the time of grievant's discharge, rules on employee attire which relate to the conduct on which the disciplinary actions against Mack were taken.

Similarly, disciplinary actions for DOT violations from 1985 to 1988 and a list of names, addresses, phone numbers, and *social security numbers* (emphasis added) of all collective bargaining unit employees employed at Malone and Hyde in 1988 were requested by the Union. The General Counsel and Charging Party contend that considering the circumstances of the grievant's discharge that this information was clearly relevant to the

44

arbitration at hand for it concerned either the grievant himself or the existence and enforcement of the work rules under which the Respondent discharged him.

The General Counsel and Charging Party also cite cases for the proposition that the Board has specifically ordered Employers to provide seniority lists, names and addresses of bargaining unit employees and information related to employee grievances. Citing *Oliver Corp.*, 162 NLRB 813 (1967); *Auto Pride*, *Inc.*, 223 NLRB 773 (1976); *ACF Industry*, 231 NLRB 83 (1977), enfd. 592, Fed. 2nd 422 (8th Cir. 1979).

In its Answer the Respondent cited in addition to the general denial eight specific defenses and relies primarily on three of them as I understood from the closing argument. That was the fourth defense, that all obligations of Respondent with respect to the Union which had existed by virtue of Sections 8(a)(9) of the Act terminated as a matter of law in November 1991.

At that time Respondent withdrew recognition of the Union as a representative of any of its employees and the General Counsel and the National Labor Relations Board found such withdrawal to be lawful. Therefore, the Complaint fails to state an actionable violation of Sections 8(a)(9) of the Act. I find that defense to be without merit particularly in light of the Order of the District Court and the Sixth Circuit Court of Appeals.

45

The Respondent relies on its fifth defense that the General Counsel is estopped and barred from prosecuting this matter as an unfair labor practice based on its previous decision not to issue a Complaint in Case 26–CA–13112 pursuant to a charge filed by the Union against Respondent on April 5, 1989 and based on the General Counsel's subsequent conduct over a period of years in which he continuously recognized the cognizance of the Court's and/or an arbitrator in this case. This defense relies primarily on the laches defense discussed earlier and I find it is without merit.

The sixth—Respondent also asserts that the General Counsel has previously administratively deferred consideration of the charge in this case to another tribunal pending determination of whether Respondent is obligated contractually to arbitrate the merits of the grievances involved herein and the General Counsel and National Labor Relations Board have no lawful basis for refusing to defer until an arbitrator makes such determination. This defense is based on Respondent's position that the two-tiered approach of determining whether or not a case is arbitrable and then proceeding on the merits in two separate proceedings should be followed and I find that this defense has no merits also.

I find that the Respondent did violate Section 8(a)(5) and (1) of the Act by its refusal and failure to furnish the information requested with the single exc4ption of the employees' social security numbers which I find were not shown to meet the discovery standard for the furnishing of business information with the exception of the social security numbers I find that all the information is relevant to the preparation and prosecution of the grievance by the Union to a possible successful conclusion and that to deny the Union this information and require it to proceed with a two-tiered approach to arbitration is unnecessarily burdensome and expensive. I find that all the information is relevant to the preparation and prosecution of a grievance by the Union to a possible successful conclusion and that to deny the Union this information and require it to proceed with a two tiered approach to arbitration is unnecessarily expensive and unfairly requiring amount of litigation.

CONCLUSIONS OF LAW

- 1. The Respondent is an employer within the meaning of Section 2(6) and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. The unit description as set out in the complaint is the appropriate unit.

4. The request for information was for information that was relevant to the suspension and discharge grievance of Richard Mack The Union made a request for this information and the Respondent refused to comply with the request. I find that the Respondent thereby violated Section 8(a)(5) and (1) of the Act with the exception of the request for the social security numbers

I find that this unfair labor practice in conjunction wit Respondent's business affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in this violation of the Act I order that Respondent post the attached notice (App. B) in an appropriate place at its facility in accordance with the usual Board procedures, that it cease and desist from violating the Act as alleged in the complaint and that, it remedy the 8(a)(5) and (1) violation by supplying to the Union the information it has requested with the exception of the social security numbers. Note: As a result of modification of the Bench decision the transcript pages of the bench decision now number pages 38–46.